IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KWARIKO, J.A., LEVIRA, J.A., KIHWELO, J.A. And MWAMPASHI, J.A)

CIVIL APPEAL No. 236 OF 2019

JEBRA KAMBOLE.....APPELLANT

VERSUS

THE ATTORNEY GENERAL .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania Main, Registry at Dar es Salaam)

(Munisi, Masoud And Luvanda JJ.)

dated the 18th day of July, 2019
in
Miscellaneous Civil Cause No. 22 OF 2018

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JUDGMENT OF THE COURT

30th May & 15th June, 2022

KIHWELO, J.A.:

The Court is invited to determine the appeal against the decision of the High Court of Tanzania, Main Registry at Dar es Salaam (henceforth "the High Court") in Miscellaneous Civil Cause No. 22 of 2018. The High Court dismissed the appellant's petition challenging the constitutionality of the provision of section 197 of the Penal Code [Cap. 16 R.E. 2002; now R.E. 2019) (henceforth "the Penal Code") in which the appellant sought to move the High Court to declare the impugned provision which provides for death penalty upon conviction

of the offence of murder unconstitutional on account that it contravenes Articles 12 (2), 13 (1) (2) (6) (a), (d) (e), 14 and 29 (1) and (2) of the Constitution of the United Republic of Tanzania 1977 as amended (henceforth "the Constitution"). The appellant further urged the High Court to order that all those who have been convicted of the offence of murder be recalled for re-sentencing and be afforded an opportunity to enter mitigation before the fresh sentence. And finally, the appellant sought to move the High Court to expunge the impugned provision from the statutes book and direct the Government to amend the said provision and prepare guidelines for resentencing in priority basis. The appeal has been sturdily contested by the respondent.

We find it crucial, at the outset, to preface the judgment with brief facts that are germane to this long-drawn out dispute which appropriately describes what precipitated this appeal. The appellant a staunch human right activist and who expressly describes himself as a patriotic and conscious Tanzanian citizen with human rights concern, through the Legal and Human Rights Center lodged the petition before the High Court challenging the mandatory imposition of death penalty under the impugned provision once an accused person is convicted of

the offence of murder despite the fact that circumstances leading to commission of murder significantly varies from one person to another and one incident to another. The appellant further alleged that the impugned provision takes away the discretion of the court to award alternative or lesser sentence to a convict of murder according to the circumstances of each case.

For the moment, it will suffice to observe that the petition was filed by way of originating summons which was predicated under Articles 26 (2) and 36 (4) of the Constitution. The petition was also expressly taken out under sections 4 and 5 of the Basic Rights and Duties Enforcement Act, (Cap 3 R.E. 2002; now R.E. 2019) and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 (the Rules). It is, perhaps pertinent to also observe at this juncture that, the originating summons was based on the following grounds:

(i) That the mandatory imposition of the death penalty under section 197 of the Penal Code is unconstitutional for the following grounds:

a) Gives rise to the denial of a fair trial because the convicts are not allowed to make any mitigation and also the court is denied the right to make proper analysis and assessments before sentencing

the convict thus, it is in violation of Article 13 (6) (a) of the Constitution.

b) The provision of section 197 of the Penal Code is unconstitutional for offending the provision of Article 13 (6) (a) of the Constitution as it denies the court an opportunity to exercise its discretion in sentencing.

c) The punishment is in violation of the right to non-discrimination as provided under Article 13 (1) of the Constitution, as whilst other convicts are allowed to mitigate, the convicts of murder are not afforded an opportunity for mitigation.

d) The punishment is in violation of the right to appeal as provided for under Article 13 (6) (a) of the Constitution, as the convict has no right to appeal against the sentence.

e) The punishment violates the right to recognition and respect for dignity under Article 12 (2) of the Constitution.

f) The punishment violates the right to protection of human dignity in the criminal process and execution of sentence under Article 13 (6) (d) of the Constitution.

g) The punishment constitutes inhuman or degrading punishment or treatment for violation of Article 13 (6) (e) of the Constitution.

h) The punishment violates the right to life under Article 14 of the Constitution.

The petition was accompanied by an affidavit sworn by Mr. Jebra Kambole, the appellant, on 9th October, 2018.

Conversely, from the other side, the petition was resisted by the respondent through a reply to the petition which was accompanied with a counter affidavit duly affirmed by Mr. Erigh Rumisha, learned State Attorney. Against the above backdrop, and in terms of Rule 13 of the Rules, the High Court ordered the parties to argue the petition by way of written submissions and, as it turned out, the parties were heedful whereby Mr. Fulgence Massawe, learned counsel filed written submissions for the appellant while Ms. Mercy Kyamba, learned Principal State Attorney filed written submissions for the respondent. In his written submissions, in support of the petition, the appellant, *inter alia*, argued at considerable length that the mandatory death penalty is unconstitutional because it subjects convicts to inhuman and degrading treatment contrary to Article 13 (6) (e) of the Constitution,

breaches protection for human dignity under Article 13 (6) (d) and Article 12 (2) of the Constitution, it involves arbitrary punishment because it is imposed on every person convicted of murder regardless of the circumstances, it breaches the right to fair trial protected under Article 13 (6) (a) of the Constitution and the sentencing process is discriminatory as offenders are denied the right to meaningful mitigation. In the upshot, he prayed for the High Court to grant the prayers as hinted above.

In reply, the respondent, gallantly resisted the petition and argued that the impugned provision is constitutional and that the mandatory death penalty is imposed on the convict upon being subjected to due process of the law including fair trial, mitigation and right of appeal. The respondent went further to submit that, there is no line of distinction between challenging the constitutionality of death penalty and challenging the mandatory imposition of the death penalty for murder. The respondent rounded up by contending that the constitutionality of the impugned provision had previously been exhaustively dealt with by the High Court and the Court of Appeal. Reliance was placed in the unreported case of **Tete Mwantenga Kafunja v. The Attorney General**, Miscellaneous Civil Cause No. 21

of 2014 and **Mbushuu Alias Dominic Mnyaroje and Another v. Republic** [1995] T.L.R. 97.

The High Court painstakingly considered the written submissions and, at the height of its deliberations, it was satisfied that it was bound by the decision of the Court of Appeal in **Mbushuu's case** (supra) and consequently, the petition was, accordingly, dismissed. The High Court held thus:

> *"In so far as we are concerned, we agree with the learned Principal State Attorney that this court is in this matter bound by the decision of the Court of Appeal in* ***Mbushuu's case*** *(supra). We are in this conclusion inspired and guided by the decisions of the Supreme Court of India in* ***Forward Construction Co. & Others v. Prabhat Mandal Andheri & Others*** *[1986] AIR 391 and* ***The State of Karnataka & Another v. All Indian Manufacturers Organisation and Others****, AIR 2006 SC 186 which were favourably relied upon by this court in the case of* ***Fikiri Liganga and Another v. The Attorney General and Another****, Miscellaneous Civil Cause No. 5 of 2017 (unreported) in relation to the applicability of the doctrine of res judicata in public interest litigation cases."*

Furthermore, at page 365 of the record the High Court in dismissing the petition it held as follows:

"On a different note, we have closely scrutinized the petitioner's pleadings to ascertain whether there are any new developments or facts pursuant to the determination in the ***Mbushuu's case****. We have found nothing new pleaded. In the absence of any new material or change of circumstances, we are of the respectful view that, this matter is res judicata and it is not open for this court to rehear it on the same facts. The petitioner is at liberty to move the Court of Appeal through review if he strongly feels that* ***Mbushuu's case*** *was determined wrongly."*

The appellant is presently aggrieved and, in an effort to challenge the impugned decision, he lodged a memorandum of appeal which is grounded upon ten points of grievance, namely:-

1. *That the learned Judges of the High Court erred in law and fact by determining that the Appellant's petition challenged the validity of the* ***death penalty itself****. In reality, the petition challenged only the* ***mandatory*** *imposition of the death penalty for murder under section 197 of the Penal Code.*

2. *That the learned Judges of the High Court erred in law and fact by failing to recognize and draw a clear distinction between an* ***automatic*** *sentence of death under section 197 and a death sentence imposed at the* ***discretion*** *of the court.*

3. *That the learned Judges of the High Court erred in law and fact by holding that the judgment in* ***Mbushuu alias Dominic Mnyaroje and another v. Republic*** *(1995) TLR 97, which*

*found the **death penalty itself** to be inhuman punishment but reasonably necessary in the public interest, is applicable and binding in this case.*

4. *That the learned Judges of the High Court erred in law and fact when they failed to address whether **discretionary** imposition of a death sentence, as opposed to its **mandatory** imposition, would sufficiently meet the public interest.*

5. *That the learned Judges of the High Court erred in law and fact by holding that the Kachukura Nshekanabo @Kakobeka v. Republic, Criminal Appeal No. 314 of 2015 (unreported), is applicable and binding in this case.*

6. *That the learned Judges of the High Court erred in law and fact by holding that the **Tete Mwantenga Kavunja v. The Attorney General**, Miscellaneous Civil Cause No. 21 of 2014 (unreported), which involved a different party and in which there was no conclusive decision on merits, rendered the issue in this case res judicata.*

7. *That the learned Judges of the High Court erred in law and fact by holding that there were no new facts, development or changes of circumstances pleaded. In particular;*

    a. *The learned Judges of the High Court erred in law and fact by failing to consider and give due regard to the evolutionary nature of fundamental rights.*

b. The learned Judges of the High Court erred in law and fact by failing to properly consider or give due regard to the fact that a mandatory death penalty has now been expressly prohibited under International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights.

c. The learned Judges of the High Court erred in law and fact by failing to properly consider or give due regard to the fact that Tanzania's retention of a mandatory death penalty puts it in breach of its obligations under international law.

d. The learned Judges of the High Court erred in law and fact by failing to properly consider or give due regard to comparative case law in which the courts of other jurisdictions have distinguished the mandatory death penalty as an arbitrary and disproportionate punishment, while affirming the death penalty itself

8. *That the learned Judges of the High Court erred in law and fact by failing to determine all issues as framed, including whether a mandatory death sentence violates articles 12 (2), 13 (1) (2), 6 (a) (d) and 29 (1) and (2) of the Constitution, or whether those violations are permitted by article 30 (2) of the Constitution as reasonably necessary in the public interest.*

9. *The learned Judges of the High Court erred in law and fact by holding that a declaration that mandatory death penalty violated*

the Constitution would render section 197 of the Penal Code wholly null and void.

10. *The learned Judges of the High Court erred in law and fact by failing to consider or have proper regard to article 64 (5) of the Constitution, which states that any law inconsistent with the Constitution shall be void only to the extent of that inconsistency."*

When, eventually, the matter was placed before us for hearing on 30th May, 2022, the appellant was represented by Mr. Mpale Mpoki, learned counsel who teamed up together with Mr. Fulgence Massawe, Mr. Daimu Halfani and Ms. Prisca Chogero all learned counsel. On the adversary side, the respondent was represented by a consortium of public attorneys, namely, Mr. George Mandepo, Mr. Abubakari Mrisha, Mr. Tumaini Kweka, both learned Principal State Attorneys, Mr. Nassor Katuga, Mr. Jenifa Kaaya, Ms. Mwanaamina Kombakono, Ms. Vivian Method, learned Senior State Attorneys, Mr. Elias Mwendwa and Mr. Ayoub Sanga learned State Attorneys. Both counsel prayed to adopt the written submissions which were lodged earlier on in terms of Rule 106 of the Tanzania Court of Appeal Rules, 2009 (the Court Rules). They further prayed to adopt the list of authorities they filed earlier in terms of Rule 34 of the Court Rules.

At the very outset, we wish to express our profound appreciation to all counsel who appeared in this matter for their industry and commendable preparedness in addressing issues of contention before us. They exhibited a high level of professional maturity expected of members of the noble profession and we commend them all for that spirit which needs to be nurtured. However, we hasten to remark that, it will not be possible and practical to recite each and every fact comprised in the submissions but we can only allude to those which are conveniently relevant to the determination of the matter before us.

In support of the appeal, the appellant prefaced their substantive submissions by arguing that the appeal before the Court is not about constitutionality of death penalty but rather it is about the mandatory imposition of death penalty for murder convicts and they referred us to a number of foreign decisions to bolster their submissions. To facilitate an ease and logical flow of their arguments, the appellant's counsel elected to divide their submissions into five issues, the first issue containing the first, second and fourth grounds, the second issue containing the third, fifth and sixth grounds, the third issue basically covering the seventh ground, the fourth issue containing the eighth ground and lastly, the fifth issue containing the

ninth and tenth grounds. In the process of arguing the appeal Mr. Fulgence Massawe and Mr. Mpale Mpoki, both learned counsel, argued the appeal in turns.

Mr. Massawe commenced his submission by arguing in support of the first issue and he faulted the High Court for finding that, challenging mandatory death penalty is the same as challenging the constitutionality of death sentence. Illustrating, he went further to submit at considerable length that, mandatory death penalty is inhuman and degrading, breaches basic rights, is arbitrary and discriminatory because it denies equal protection to convicts of murder cases and it also violates the right to fair trial. To facilitate the appreciation of his proposition, the learned counsel, referred us to numerous decisions of this Court and foreign jurisdictions namely, **Mbushuu's case** (supra), **DPP v. Daudi Peter** [1993] T.L.R. 22, **Kukutia Ole Pumbun v. Attorney General** [1993] T.L.R. 159, **Mithu v. Punjab** (1983) 2 SCR 690, **Johnson v. Republic**, Communication No. 2177/2012, **Attorney General v. Kigula** [2009] UGSC 6, **Kigula v. Attorney General** [2005] UGCC 8, **Muruatetu v.**

Republic Petition No.15 and 16 of 2015 and **Kafantayeni v. Attorney General** [2007] MWHC 1.

Arguing in support of the third issue, Mr. Massawe, who apparently, faulted the High Court for its failure to appreciate the fact that there were new circumstances since the decision in **Mbushuu's case** was pronounced, he valiantly submitted that, there are a lot of new facts, new conventions, new foreign case laws and new narratives which were not in existence or raised during the determination of the **Mbushuu's case** and for that reason he argued that, the High Court wrongly arrived to an erroneous and misleading decision that the matter before it was *res judicata*. To fortify his contention, Mr. Massawe referred us to the case of **Attorney General v. Kigula** (supra) in which the Supreme Court of Uganda acknowledged the distinction between death penalty and the manner upon which death penalty is imposed.

Mr. Massawe, was fairly very brief in his submission regarding the fourth issue. He contended that, the High Court improperly decided to select few issues and leave other issues which were framed and agreed upon by the parties unattended without assigning any reason leave alone good reason. Counsel further cited in particular,

the omission to determine the issue whether a mandatory death penalty violates articles 12 (2), 13 (1) (2) (6) (a) (d) and 129 (1) and (2) of the Constitution or whether those violations are permitted by article 30 (2) of the Constitution.

On the fifth issue, Mr. Massawe faulted the High Court for holding that in declaring the provision of section 197 of the Penal Code unconstitutional on the basis of mandatory death penalty, the entire provision will become null and void. Thus, to him, this holding was erroneous and misleading since in terms of article 64 (5) of the Constitution any statute which is inconsistent with the Constitution shall be void only to the extent of that inconsistency. Counsel further submitted that, the High Court would not have declared the entire provision unconstitutional, but rather, it would have declared it unconstitutional only to the extent that it would read "may" in place of the word "shall". Thus, in sum, his submission challenged the entire judgment and findings of the High Court.

On the other hand, Mr. Mpoki argued the second issue in line with the third, fifth and sixth grounds of appeal on whether the High Court made a proper determination in arriving at the conclusion that the case is *res judicata*. The learned counsel, was of the view that, the

applicability of the doctrine of *res judicata* is both a mixed matter of law and fact and that the respondent did not expressly state that they will rely on the doctrine of *res judicata*. He referred us to paragraph 19 of page 24 of the record to substantiate his line of argument.

Still on the second issue, the learned counsel submitted that the doctrine of *res judicata* in our statutes is covered under section 9 of the Civil Procedure Code, [Cap 33 R.E. 2002; now R.E. 2019] ("the CPC") which we shall reproduce in due course, and explanation I to VI is categorically clear on circumstances under which the doctrine is applicable. Elaborating further, Mr. Mpoki contended that, for the doctrine of *res judicata* to apply, parties in the previous suit must be the same and the matter in issue must have been directly and substantially the same in the former suit and that the suit must have been finally and conclusively decided. Thus, in his opinion, the decision in **Mbushuu's** case is not applicable since the matter was not substantially and directly the same in the two cases. Nonetheless, Mr. Mpoki candidly conceded that the doctrine of *res judicata* is applicable to public interest litigation, however, he argued that all the elements of *res judicata* must be proved to have existed. In this respect, he referred us to page 8 of the decision in **Forward Construction Co.**

& Others v. Prabhat Mandal Andheri & Others [1986] AIR 391, **The State of Karnataka & Another v. All Indian Manufacturers Organisation and Others**, AIR 2006 SC 186 and page 3 of the decision in **Smt V. Rajeshwari v. T.C. Saravanabava,** Supreme Court of India. In the case of **Smt V. Rajeshwari** (supra) it was stated that, a plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal, he said. Mr. Mpoki insistently argued that, since section 9 of the CPC is statute *in pari materia* to section 11 of the Indian Code of Civil Procedure then Indian cases are highly persuasive.

Mr. Mpoki further illustrated that, since the plea of *res judicata* was not raised as required then it cannot be relied upon and that the case of **Mbushuu** (supra) was not a public interest litigation. He further submitted that the case of **Tete Mwantenga Kavunja** (supra) was not finally and conclusively decided. He finally prayed spiritedly that the appeal be allowed and a mandatory death penalty be declared unconstitutional. He further prayed that section 197 should be amended to the effect that the word "shall" is replaced by the word "may" and that all those who were convicted and sentenced

should be recalled again for resentencing or cases be remitted back to the High Court before another bench for retrial.

When prompted by the Court, to clarify on whether the statement by the respondent at paragraph 19 of the reply to the petition to the effect that the constitutionality of the mandatory imposition of death penalty was already determined by the Court of Appeal did not suffice to notify the appellant, Mr. Mpoki reluctantly admitted that the respondent raised the issue of *res judicata* in the reply to the petition.

On the adversary, the respondent's counsel were very adamant and clearly commenced with a brief and focused reply supporting the decision of the High Court. Mr. Mandepo who took first the floor, contended that although the appellant has submitted strongly on the issue of constitutionality of the mandatory imposition of death penalty but the originating summons is conspicuously silent on that prayer and in the contrary the appellant's prayer particularly at page 10 of the record is for declaration that section 197 of the Penal Code is unconstitutional and therefore it should be expunged from the statute books. Illustrating further, he argued that, there was no specific prayer on mandatory imposition of death penalty as the learned

Judges before the High Court rightly observed at page 363 of the record.

Mr. Mandepo further submitted in response to the first issue that, the respondent finds no line of distinction between challenging the constitutionality of mandatory death penalty and challenging death penalty itself. According to Mr. Mandepo, the two are one and the same thing and therefore he was of the view that, the learned Judges before the High Court were undeniably right in holding that the two are inseparable. In further elaboration, the learned Principal State Attorney, contended that, the provision of section 197 of the Penal Code is not unconstitutional since it is saved by Article 30 (2) of the Constitution. He further went on to argue that the impugned provision is not arbitrary, discriminatory, it is in line with fair trial processes and does not deprive murder convicts the right to mitigation as well as appeal.

Furthermore, despite the mandatory nature of death penalty there has been numerous occasions where this Court, has varied that sentence after due process, the learned Principal State Attorney, argued. He cited, for instance, the case of **Daudi Sabaya v. Republic** [1995] T.L.R. 148 and **Herman Nyiugo v. Republic**

[1995] T.L.R. 178. In terms of discretion in sentencing, the learned Principal State Attorneys contended that, the Constitution as well as the Criminal Procedure Act, [Cap 20 R.E. 2019] (CPA) in particular section 26 (1) and (2) of the CPA affords an opportunity to the court to offer alternative sentence to murder convicts especially those who are juvenile and pregnant women. Similarly, section 320 of the CPA permits the court to conduct a sentencing hearing which may lead to a different outcome.

In response to the second issue regarding the propriety of the application of the principle of *res judicata*, the learned Principal State Attorney contended that the principle was properly pleaded in the reply to petition by the respondent. He went further to submit while referring to section 9 of the CPC that, the essence of the doctrine is to ensure that litigation comes to an end. He spiritedly submitted further that, in the instant appeal the matter before the High Court was *res judicata* because the constitutionality of death penalty under section 197 of the Penal Code was long settled by this Court in **Mbushuu's case** (supra) and that was the basis of the decision in **Tete Mwamtenga Kafunja** (supra) which was cited in the impugned ruling. He argued that, it was remarkable to note that the prayers in

the impugned ruling were the same as in the previous case and that the doctrine of *res judicata* applies in private litigation equally as it does in public interest litigation. In the opinion of the learned Principal State Attorney, the law is settled and clear in this matter and under the doctrine of *stare decisis* the High Court was bound to follow. To bolster his argument, the learned Principal State Attorney referred us to the most celebrated case of **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa** [1998] T.L.R. 146.

Addressing the third issue, the learned Principal State Attorney was fairly brief and contended that, the underlying arguments before the High Court touched upon challenging the provision of section 197 of the Penal Code which was declared by this Court to be constitutional and despite the said change of narratives, the legislature in its wisdom has not yet found the need to amend it to date.

In response to the fourth issue the learned Principal State Attorney was equally very brief and submitted that, the High Court did not ignore other issues as the same was discussed at considerable length as clearly reflected from pages 354 to 364 of the record, and the court came to the conclusion that, this matter was already settled by the case of **Mbushuu** as held in **Tete Mwantenga's** case (supra)

whose issues were identical to the one which is subject of the instant appeal.

On the issue of declaring the provisions of section 197 of the Penal Code unconstitutional only to the extent of the mandatory nature of the death penalty, the learned Principal State Attorney was adamant that, this Court has no jurisdiction to entertain something which was never determined by the lower court. Thus, in sum, the learned Principal State Attorney prayed that the appeal be dismissed with costs.

In a brief rejoinder, Mr. Massawe reiterated his earlier submission and in addition he contended that, the respondent did not explain what is the effect if the convict is not one of those covered by the provisions of the law in terms of exception when it comes to death penalty because of their age and pregnancy. He further argued that, where judicial mind in sentencing is deprived in exercising discretion then that law is unfair, unjust and not reasonable. He finally wrapped up his submission by contending that the **Tete Mwantenga's** case (supra) was not decided on merit and the **Mbushuu's** case (supra) was decided on the basis of constitutionality of death penalty and therefore the impugned case was not *res judicata*. However, he did

not address the Court on the similarity of the issues in **Tete Mwantenga** and the matter which is subject of this appeal.

Having carefully examined the record and dispassionately considered the respective submissions of the parties in support and opposition of the appeal, we should now address the contending issues and determine the appeal.

For the sake of convenience, we shall dispose first the second issue which touches upon the aspect of *res judicata,* which counsel for both parties addressed at considerable length in their written submissions and during oral clarifications.

Our starting point will involve a reflection of the law that provides for the doctrine of *res judicata*. For the sake of clarity, we wish to reproduce the provision of section 9 of the CPC which provides thus:

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court".*

Speaking of the above provision, it is, perhaps, pertinent to observe that, the law in this country, like the laws of other jurisdictions, recognizes that, like life, litigation has to come to an end. Those who believe that litigation may be continued as long as legal ingenuity has not been exhausted are clearly wrong. See, for instance, the case of **Peniel Lotta v. Gabriel Tanaki and Others** [2003] T.L.R. 312. Therefore, the object of section 9 of the CPC is to bar multiplicity of suits and guarantee finality to litigation. The doctrine of *res judicata* is also there to ensure certainty in the administration of justice. See, for instance, the unreported case of **East African Development Bank v. Blueline Enterprises Limited**, Civil Appeal No. 110 of 2009 which was also cited in the unreported case of **The Attorney General v. Dickson Paulo Sanga**, Civil Appeal No. 175 of 2020 in which, while discussing the doctrine of *res judicata*, we were persuaded by a commentary by one eminent writer Professor M.P. JAIN in his book titled **Indian Constitutional Law**, 5th Edition, 2004 at 1314 and we felt obliged to excerpt some relevant passage articulating the rationale of the doctrine of *res judicata*:

> *"...The rule of res judicata is based on considerations of public policy as it is in the larger interests of the society that a finality should attach to binding decisions of courts of*

competent jurisdiction, and that individuals should not be made to face the same kind of litigation twice...."

In this case counsel are not at issue in as far as the application of the doctrine of *res judicata* in public interest litigation is concerned and we take inspiration from the cited case of **The State of Karnataka & Another** (supra) in which the Supreme Court of India while considering the doctrine of *res judicata* as it applies to public interest litigation had the following to say:

"...in public interest litigation, the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bonafide, a judgment in previous public interest litigation would be a judgment in rem. It binds the public at large and bars any member of the public from coming forward before the court and raising any connected issue or an issue, which had been raised/should have been raised on an earlier occasion by way of a public interest litigation..."

We fully subscribe to, and adopt the foregoing statement of principle as good law in our jurisdiction bearing in mind that section 9 of our CPC is a statute *in parimateria* to section 11 of the Indian Civil Procedure Code.

The real pith and marrow in the instant appeal is whether the impugned decision was *res judicata*. Mr. Mpoki, learned counsel on his

part argued that, the suit was not *res judicata* because the decision in **Mbushuu's** case is not applicable since the matter was not substantially and directly the same in the two cases and therefore all the elements of *res judicata* did not cumulatively exist. Mr. Mandepo, the learned Principal State Attorney in pressing his argument contended that in the instant appeal the matter before the High Court was *res judicata* because the constitutionality of death penalty under section 197 of the Penal Code was long settled by this Court in **Mbushuu's case** (supra) and that was the basis of the decision in **Tete Mwamtenga Kafunja** (supra) cited by the High Court in the impugned ruling.

We feel compelled, at this point to state that, the learned Principal State Attorney was undeniably right to state that *res judicata* was properly pleaded in the reply to petition. Since the hearing was conducted by way of written submission, we hasten to state that, not only did the respondent state *res judicata*, but also its submissions addressed at great length this issue and the court came up with a conclusion that the matter was *res judicata*. Without prejudice, and for the sake of argument, even if the plea of *res judicata* was not raised,

in the case of **Smt v. Rajeshwari** (supra) cited to us by Mr. Mpoki the Supreme Court of India had the occasion to state that:

> *"The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then as issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of the appeal (See: (Raja) Jagadish Chandra Deo Dhabal Deb v. Gour Hari Mahato & Others, AIR 1936 Privy Council 258, Medapati Surayya & Ors v. Tondapu Bala Gangadhara Ramakrishna Reddi & Others, AIR 1948 Privy Council 3, Katragadda China Anjaneyulu & Another v. Katragadda China Ramayya & Others, AIR 1965 A.P.177 Full Bench. The view taken by the Privy Council was cited with approval before this Court in The State of Punjab v. Bua Das Kaushal (1970) 3 SCC 656. However, an exception was carved out by this Court and the plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the Trial Court. The opposite party had ample opportunity of leading the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had throughout been in consideration and discussion and so the want of pleadings or plea of waiver of res judicata cannot be allowed to be urged."*

We subscribe to the stance taken by the Supreme Court of India. In the circumstances, even if the plea of *res judicata* was not raised at the trial, the right of the respondent to raise it on appeal was not waived as parties could be heard and the matter determined.

It is instructive to interject a remark, by way of a postscript that the High Court made that decision fully, aware of the holding in **Mbushuu's** case in which we held that:

> *"Though the death penalty as provided by s 197 of the Penal Code, Cap 16, offends art 13 (6) (d) and (e) of the Constitution, it is not arbitrary, hence a lawful law and it is reasonably necessary and it is thus saved by art 30 (2) of the Constitution; the death penalty is, therefore, not unconstitutional."*

In making further determination in that case we held that:

> *"We may observe here that we are aware of the drive to abolish the death penalty worldwide. But that has to be done, as the learned Trial Judge has aptly put it, by deliberate moves 'to influence public opinion in a more enlightened direction.' For the present, even international instruments still provide for the death penalty."*

We are therefore satisfied, as the High Court did, that, the constitutionality of death penalty under the impugned provision cannot

be looked at in isolation of the element of mandatory imposition of the death penalty. For the sake of clarity and precision, we think, it is opportune to excerpt part of the record of appeal at page 361 in which the court held:

> *"We are, at this juncture, of the settled view that consideration of the constitutionality of the death penalty under section 197 of the Penal Code necessarily entails consideration of the element of the law on the mandatory imposition of the death sentence to a convict of murder as was in* ***Mbushuu's*** *case (supra). We say so because the element of the mandatory imposition of death penalty under the impugned provision of the law has been a conspicuous feature of the impugned provision since the Court of Appeal determined the constitutionality of the death penalty in* ***Mbushuu's*** *case (supra). We are increasingly persuaded that the constitutionality of death penalty under the impugned provision cannot be looked at in isolation of the element of mandatory imposition of the death penalty. As we mentioned earlier, the impugned provision has never been changed ever since the decision of the Court of Appeal in Mbushuu's case (supra).*

Quite clearly, the excerpt above underscores the fact that the High Court, rightly made the impugned decision aware of the fact that section 197 of the Penal Code has been the subject of litmus test in

particular its constitutionality since the decision in **Mbushuu's** case which was relied upon by the High Court in the case of **Tete Mwamtenga Kafunja** (supra) which was also the basis of the decision in the impugned decision. We are mindful of the fact that, in their submissions, the learned counsel for the appellant argued that the **Tete Mwantenga's** case (supra) was not decided on merit and the **Mbushuu's case** (supra) was decided on the basis of constitutionality of death penalty and therefore the impugned case was not *res judicata*. In our considered opinion, this argument although attractive, but it would be presumptuous to think that the impugned decision was not *res judicata* as the learned counsel for the appellant have tried to make such an enduring impression. For the better understanding of what was sought before the High Court in the case of **Tete Mwantenga** (supra) we think it is desirable to reproduce the prayers;

> *(a) That, section 197 of the Penal Code, Cap 16 (R.E. 2002) provides for mandatory imposition of the death sentence upon conviction of the offence of murder without giving the convicted person right to mitigate for the lesser sentence which contravenes the provisions of Articles 13 (1) (6) (a) of the Constitution of the United Republic of Tanzania 1977 as amended.*

(b) That, the provision takes away the discretion of the court to award alternative or lesser sentence to the convict and remains with only one sentence of death the same contravenes the provisions of Article 14 of the Constitution of 1977 (sic) as amended."

It is conspicuously clear that, in the **Tete Mwamtenga's** case the prayers were the same as in the case subject of the present appeal and that the court rightly found that section 197 of the Penal Code which was subject of the challenge had already been tested in the **Mbushuu' case** without any qualification as the entire section 197 of the Penal Code was found not to be unconstitutional. Moreover, the decision in **Tete Mwamtenga's** case has not been subjected to an appeal to date despite the fact that the counsel in that case was the same counsel in the case subject of the present appeal. Thus, to hold that the case under scrutiny was not *res judicata*, in our view will be erroneous and misleading. We venture to say that, for the foregoing reasons, that concludes our deliberations on the second issue which is, accordingly, answered in the affirmative.

As this issue alone suffices to dispose of the appeal, we shall not make a painstaking inquiry into the remainder of the issues which will be an academic exercise in futility. In view of the aforesaid, there

can be no better words to express our view and conclude as we do that, we find no merit in the appeal. Consequently, we dismiss it in its entirety. However, given the nature of the appeal, we make no order as to costs.

DATED at **DAR ES SALAAM** this 13th day of June, 2022

S. E. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 15th day of June, 2022 in the presence of the Mr. Aman Joachim, counsel for the appellant and Mrs. Joyce Yonazi, learned Senior State Attorney for the respondent is hereby certified as a true copy of the original.

A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL